IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

EQUITY RESIDENTIAL, a Maryland real estate investment trust; EC-STERLING HEIGHTS, LLC, a Delaware limited liability company; COUNTRY CLUB CONDOMINIUM, LLC, a Delaware limited liability company; BALATON CONDOMINIUM, LLC, a Delaware limited liability company; EC-TIMBER RIDGE, LLC, a Delaware limited liability company, Appellants, v. ACE AMERICAN INSURANCE COMPANY, a foreign insurance company; AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, a foreign insurance company; ILLINOIS NATIONAL INSURANCE COMPANY, a foreign insurance company; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a foreign insurance company; ADMIRAL INSURANCE COMPANY, a foreign insurance company; NATIONAL SURETY COMPANY, a foreign insurance company; UNITED STATES FIDELITY AND GUARANTY COMPANY, a foreign insurance company; NATIONAL LIBERTY INSURANCE COMPANY, INC., a foreign insurance company, Respondents.	)	No. 63358-9-I UNPUBLISHED OPINION FILED: March 22, 2010

Ellington, J. — This is a forum selection case. Four limited liability companies,

all incorporated in Delaware and having their principal places of business in Illinois, were the declarants on four condominium conversion projects in Washington. All four homeowner associations sued for construction defects. An insurance coverage dispute developed. The defendant declarants and a related entity, Equity Residential, a Maryland real estate investment trust with its principal place of business in Illinois, filed a declaratory action against several insurance companies, all domiciled in Illinois or elsewhere. The Washington trial court dismissed the coverage case on forum non conveniens grounds in favor of Illinois. Finding no abuse of discretion, we affirm.

Background

Equity Residential is a Maryland real estate investment trust that owns and manages residential properties across the country, including properties in Illinois and Washington. Its principal place of business is in Chicago. Equity Residential has a thrice-removed controlling interest in Balaton Condominium, LLC, Country Club Condominium, LLC, EC-Timber Ridge, LLC, and EC-Sterling Heights, LLC, all Delaware limited liability companies with their principal places of business in Chicago.[1] The four LLCs acted as the declarants on four condominium conversion projects in Washington.

[1] Equity Residential is the sole general partner of ERP Operating Limited Partnership, of which it owns approximately 94.2 percent. Equity Residential conducts its business primarily through ERP Operating Limited Partnership and its subsidiaries. ERP Operating Limited Partnership owns 100 percent of common stock of Equity Residential Properties Management Corporation, which is the primary property management company for all Equity Residential real estate investment trust properties. Equity Residential Properties Management Corporation owns and operates single-purpose limited liability companies created for the purpose of acquiring and selling condominium properties. The four defendant LLCs are such single-purpose limited liability companies.

In 2007 and 2008, the homeowner associations and several unit owners at the four condominiums (together, the HOAs) sued Equity Residential and the four LLCs (together, Equity) in five Washington lawsuits, claiming construction defects and water intrusion problems.[2] The HOAs alleged, among other claims, breach of contract, breach of implied and express warranties, and breach of duties under the Washington Condominium Act, chapter 64.34 RCW.

Seven insurance companies[3] issued policies to Equity Residential, and in some cases to the LLCs, starting in mid-1990s. In 2008, Equity tendered defense in the underlying lawsuits to the carriers. When several insurers failed to respond, Equity sued in King County Superior Court seeking a judicial declaration of coverage and breach of the duty to defend. Equity also alleged the insurers violated the Washington Administrative Code,[4] the Washington Consumer Protection Act, chapter 19.86 RCW, and committed the tort of bad faith.

National Surety sought dismissal on forum non conveniens grounds, pointing out that the Equity companies are located in Illinois, the parties entered into their insurance contracts there, and all evidence related to the policy interpretation is in Illinois or elsewhere, but not in Washington. Several other insurers joined in the motion.[5] [6]

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[2] The five lawsuits also named as defendants some or all of ERP Operating Limited Partnership, Equity Residential Properties Management Corporation, and Equity Residential Condominiums, LLC.

[3] American International Specialty Lines Insurance Company, National Union Fire Insurance Company, Illinois National Insurance Company, National Surety Company, ACE American Insurance Company, Admiral Insurance Company and United States Fidelity and Guaranty Company.

[4] Equity did not specify which provisions of the Washington Administrative Code the insurers allegedly violated.

Equity opposed the motion, arguing that Illinois is not an adequate available alternative forum because under Illinois law, the HOAs would be mandatory parties to the coverage dispute but could not be joined because they are not subject to Illinois jurisdiction. Equity also argued that a coverage suit involving damage to real property must proceed in the forum where the real property is located.

The trial court declined to decide whether the HOAs would be necessary parties to an Illinois lawsuit, but concluded Illinois is the appropriate forum.

Equity appeals.

DISCUSSION

The doctrine of forum non conveniens grants a court the discretionary power to decline jurisdiction "'when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.'"[7] The doctrine limits a plaintiff's choice of forum to prevent inflicting expense or trouble not necessary to the plaintiff's right to pursue a remedy.[8] Notwithstanding that discretion, courts are highly deferential to the plaintiff's choice of forum: "'[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'"[9] An appellate court reviews an order dismissing a lawsuit on forum non conveniens

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[5] After this appeal was filed, Equity and National Union settled.

[6] In a separate motion, National Surety requested a summary ruling that Illinois law applied to the substantive issues in the case. The court did not decide this motion.

[7] Sales v. Weyerhauser Co., 163 Wn.2d 14, 20, 177 P.3d 1122 (2008) (quoting Johnson v. Spider Staging Corp., 87 Wn.2d 577, 579, 555 P.2d 997 (1976)).

[8] Id.

[9] Meyers v. Boeing Co., 115 Wn.2d 123, 128–29, 794 P.2d 1272 (1990) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 2d 1055 (1947)).

grounds under the abuse of discretion standard.[1] A court's decision constitutes an abuse of discretion only if it is "manifestly unfair, unreasonable, or untenable."[11]

The defendant seeking a change of venue has the burden of establishing "(1) that there is an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal."[12] An alternative forum is considered adequate if the plaintiff can litigate "'the essential subject matter of the dispute.'"[13] The first issue is a threshold one: unless an adequate alternative forum exists, the forum non conveniens factors are irrelevant, and the court must deny the motion.[14]

Adequacy of the Forum

The parties agree that, if available, Illinois would be an adequate alternative forum. The point of contention is whether Illinois is in fact an available forum. "An alternative forum is considered available if the entire case and all parties can come within its jurisdiction."[15] Here, the question is whether the HOAs would be necessary parties to an Illinois coverage suit. The trial court declined to decide the issue. However, an appellate court may affirm on any ground the record supports.[16]

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[1] Sales, 163 Wn.2d at 19.

[11] Meyers, 115 Wn.2d at 128.

[12] Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1118 (9th Cir. 2002).

[13] Hill v. Jawanda Transport, Ltd., 96 Wn. App. 537, 542, 983 P.2d 666 (1999) (quoting Capital Currency Exch. N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 611 (2nd Cir.1998)).

[14] Klotz v. Dehkhoda, 134 Wn. App. 261, 265, 141 P.3d 67 (2006).

[15] Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665 (5th Cir. 2003); see also Piper Aircraft v. Reyno, 454 U.S. 235, 254 n.22, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (alternative forum ordinarily exists "when the defendant is 'amenable to process' in the other jurisdiction").

[16] State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Under Illinois law, a necessary party is "'one who has a legal or beneficial interest in the subject matter of the litigation and will be affected by the action of the court.'"[17] The interest must be a present, substantial interest, as distinguished from a mere expectancy of future contingent interest.[18] An order entered without jurisdiction over a necessary party is null and void if that party was not joined to the action,[19] even when the court's ultimate decision was in that party's favor.[2] The necessary-party rule is "inflexible, yielding only when the allegations of the bill disclose a case so extraordinary and exceptional in character as that it is practically impossible to make all parties in interest parties to the suit, and further, the others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons."[21]

There are three situations when a party is necessary such that an Illinois lawsuit should not proceed in his or her absence: (1) when the party has an interest in the subject matter of the controversy that would be materially affected by a judgment

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[17] Holzer v. Motorola Lighting, Inc., 295 Ill. App. 3d 963, 693 N.E.2d 446, 452 (1998) (quoting Soc'y of Mount Carmel v. Nat'l Ben Franklin Ins. Co. of Illinois, 268 Ill. App. 3d 655, 643 N.E.2d 1280, 1284 (1994)).

[18] Oglesby v. Springfield Marine Bank, 385 Ill. 414, 52 N.E.2d 1000, 1004 (1944).

[19] Allied American Ins. Co. v. Ayala, 247 Ill. App. 3d 538, 616 N.E.2d 1349, 1355 (1993).

[2] Mount Carmel, 643 N.E.2d at 1285.

[21] Oglesby, 52 N.E.2d at 1004. Insurers point to a decision where the court held that a mass tort lawsuit involving thousands of plaintiffs from all over the country was an extraordinary case not subject to the mandatory rule. See Zurich Ins. Co. v. Baxter Int'l Inc., 275 Ill. App. 3d 30, 655 N.E.2d 1173 (1995). But the Illinois Supreme Court declared that discussion of no precedential value. See Zurich Ins. Co. v. Baxter Int'l Inc., 173 Ill.2d 235, 670 N.E.2d 664, 668 (1996).

entered in his or her absence; (2) when necessary to protect the interests of those who are before the court; and (3) when necessary to enable the court to make a complete determination of the controversy.[22] Joinder is mandatory in the first two circumstances, discretionary in the third.[23]

Equity argues the HOAs fall in the first category and are necessary parties subject to mandatory joinder.[24]

As Equity points out, Illinois courts have consistently determined that a tort claimant is a necessary party to a declaratory judgment action brought to determine insurance coverage for that claim:

> Courts have based the determination that the claimant in the underlying action is a necessary party on the idea that such claimants have a "substantial right in the viability of the policy," (M.F.A. Mutual Insurance Co. v. Cheek, 66 Ill. 2d at 495, 6 Ill. Dec. at 864, 363 N.E.2d at 811), or that they are "a real party in interest to the liability insurance contract" whose rights "vest at the time of the occurrence giving rise to his injuries." (Reagor v. Travelers Insurance Co., 92 Ill. App. 3d at 103, 47 Ill. Dec. at 509, 415 N.E.2d at 514.) In so doing, courts have noted that a declaration of non-coverage would eliminate a source of funds. (Flashner Medical Partnership v. Marketing Management, Inc. (1989), 189 Ill. App. 3d 45, 136 Ill. Dec. 653, 545 N.E.2d 177.)[25]

Relying on those cases, at least one Illinois court held that "under Illinois law claimants against the insured ordinarily are necessary parties to actions in which

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[22] Holzer, 693 N.E.2d at 452.

[23] See id. at 457–58.

[24] In their appellate briefs and before the trial court, the insurers argue at large that Equity took an allegedly incompatible position in two Florida coverage actions when it moved for dismissal on grounds that Illinois was a more convenient forum. Equity contended that the underlying Florida plaintiffs were not necessary parties in an Illinois insurance lawsuit. The insurers do not argue Equity is estopped from arguing its current position by that reason only. The Florida lawsuits are therefore irrelevant.

[25] Mount Carmel, 643 N.E.2d at 1285.

questions of liability insurance coverage are litigated."[26] Despite the seemingly broad reach of this holding, however, in practice the rule appears to have been applied only where the underlying actions sounded in tort.[27] For example, a later Illinois decision found the alleged violator of a partnership agreement was not a necessary party in an action between the partnership and a competitor:

> This case is not analogous to cases involving a limited fund, the depletion of which might prejudice the absent party (compare Oglesby v. Springfield Marine Bank, 385 Ill. 414, 52 N.E.2d 1000 (1944)), nor to cases in which a claimant in an underlying tort action could be prejudiced by the outcome of an insured's declaratory judgment action against his insurer (compare Society of Mount Carmel, 268 Ill. App. 3d at 661, 205 Ill. Dec. at 677, 643 N.E.2d at 1284).[28]

While the underlying plaintiffs sued Equity in tort as well as in contract, Equity seeks coverage from the insurers only for those parts of the underlying lawsuits dealing with "the property damage giving rise to the alleged 'suitability' warranty violations."[29]

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[26] American Home Assur. Co. v. Northwest Indus., Inc., 50 Ill. App. 3d 807, 365 N.E.2d 956, 960–61 (1977). The opinion does not state whether the underlying actions sounded in tort, contract, or both. The case involved a lawsuit for injuries and indemnification brought by a manufacturer of animal feed against a manufacturer of chemicals that mistakenly supplied a highly toxic flame retardant instead of a diary feed mineral supplement. The feed manufacturer mixed the flame retardant with animal feed which it then used and also sold to numerous farmers. The consumption of contaminated feed by livestock resulted in substantial losses to the feed manufacturer, farmers and other persons. Id., 365 N.E.2d at 958.

[27] See, e.g., Flashner Med. P'ship v. Mktg. Mgmt., Inc., 189 Ill. App. 3d 45, 545 N.E.2d 177, 183 (1989). More telling, Equity has been unable to find one case applying the rule to an insurance coverage dispute grafted on a construction defects lawsuit. In contrast, the insurers have provided us with construction defects cases where coverage lawsuits proceeded without the underlying plaintiffs. See, e.g., Bituminous Cas. Corp. v. Gust K. Newburg Constr. Co., 218 Ill. App. 3d 956, 578 N.E.2d 1003 (1991) (issue of joinder not raised).

[28] Holzer, 693 N.E.2d at 453–54. In Oglesby, the court held that potential trust beneficiaries are necessary parties to an action seeking declaration that such a trust existed. See Oglesby, 52 N.E.2d at 1007.

Equity does not argue this claim sounds in tort. Equity characterizes the HOAs' claims as tort claims because they alleged negligent fulfillment of contractual duties.[3] But whether an action sounds in contract or tort is determined from the pleadings and complaint as a whole and the evidence, not from particular words or allegations, the form adopted by the pleadings, or the understanding of counsel or the trial court.[31] The essence of the relevant underlying claims is breach of a warranty implied in the contracts between the declarant LLCs and the underlying plaintiffs. The claims sound in contract, not tort.

Further, it is undisputed that Equity Residential enjoys an exceptionally strong financial situation, such that there is no danger it would be unable to satisfy a judgment for the HOAs.[32] Equity posits the possibility of judgment exclusively against the LLCs, but tellingly, Equity does not contend the LLCs would be unable to satisfy the judgments. In fact, one of the LLCs has affirmatively indicated its ability to satisfy its

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[29] Clerk's Papers at 379. Equity's complaint states that "the Underlying Lawsuits each allege that each Plaintiff is liable as a condominium 'declarant' under RCW Chapter 64.34 and applicable Washington case law, and that each Plaintiff is therefore liable to the Associations under the implied 'suitability' warranty set forth in RCW 64.34.445 (2)." Clerk's Papers at 378. Equity does not mention the other underlying claims.

[3] Equity relies on the underlying plaintiffs' allegations that it negligently and otherwise tortiously failed to "properly inspect" the condominiums, Clerk's Papers at 162, and that they have been injured "[a]s a direct and proximate result of the Defendants' negligence," Clerk's Papers at 244.

[31] Bank of America NT & SA v. Hubert, 153 Wn.2d 102, 124, 101 P.3d 409 (2004).

[32] The company is "one of the largest publicly traded real estate companies and is the largest publicly traded owner of multifamily properties." Clerk's Papers at 520. As of December 31, 2007, Equity Residential had total assets exceeding 15 billion dollars, liabilities of 10 billion dollars, and 50 million dollars in available cash.

obligations regardless of insurance coverage. The Illinois policy of protecting the potential fund for recovery by the underlying plaintiffs thus would have no application here even if the case sounded in tort.

We conclude that Illinois law does not require joinder of the underlying plaintiffs in this insurance coverage action.[33] Illinois is therefore an adequate alternative forum.

Balancing Factors

The second part of a forum non conveniens analysis focuses upon consideration and balancing of certain private and public interest factors.[34] Each case turns on its facts.[35] "'[W]here the court has considered all relevant and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference."[36]

The private factors include the convenience of litigation in the alternative forum; the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining their attendance; the need for of a view of the premises; and all other practical issues that make trial of a

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[33] Additionally, ACE argues that, even if the HOAs are recognized as potentially necessary parties, there is a question whether their interest is present, as opposed to a mere expectancy of future contingent interest. See Oglesby, 52 N.E.2d at 1004. ACE relies on the fact that its policies are excess commercial general liability policies, with a per-occurrence "retained limit" of $500,000 for the 2000–02 policy, and $1,000,000 for each successive policy thereafter. In view of our analysis, it is unnecessary to address this argument.

[34] See Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

[35] Piper Aircraft v. Reyno, 454 U.S. 235, 249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

[36] Creative Tech., Ltd. v. Aztec Sys. Pte, Ltd., 61 F.3d 696, 699 (9th Cir. 1995) (quoting Ceramic Corp. of America v. Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993)).

case easy, expeditious and inexpensive.[37]

These factors depend upon the substance of the dispute.[38] Here, the chief issues are the interpretation of the insurance policies. Equity and the insurers disagree as to whether the LLC entities are covered under the policies, whether construction defects and other damages qualify as "occurrences," whether Equity satisfied various policy conditions, and whether the facts giving rise to the lawsuit occurred within the time frames provided for in the policies.

With the exception of the last issue, the evidence related to these questions consists of documents generated in Illinois and other states, but not Washington, and testimony of witnesses residing in Illinois or other states, but not Washington. Because Equity is domiciled in Illinois, it is to be expected that the bulk of the evidence will come from that state. Equity and the insurers will likely save money and resources by avoiding substantial transportation costs associated with litigating in Washington. The same is true for potential witnesses, as Illinois is more accessible from New York, Pennsylvania, Colorado, Georgia, where many witnesses reside, than is Washington. If the parties travel to depose witnesses, again, Illinois is the more cost- and time-effective option. It is entirely speculative whether or to what extent evidence regarding damages would be necessary in Illinois. The trial court did not abuse its discretion in concluding the private factors favor Illinois as the more convenient forum.

The public factors include administrative difficulties for courts as well as jury duty

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[37] Myers, 115 Wn.2d at 128 (adopting forum non conveniens factors set forth in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)).

[38] Van Cauwenberghe v. Biard, 486 U.S. 517, 528, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988).

imposed upon the people of a community having no relation to the litigation.[39] There is a local interest in having controversies decided at home.[4] It is also appropriate to have the trial of a diversity case in a forum that is at home with the state law that must govern the case.[41] These factors also favor Illinois.

Equity contends the coverage litigation should be conducted in the forum where the real property damage occurred. For this proposition, Equity relies on J.H. Baxter & Co. v. Central National Insurance Co. of Omaha[42] and Vulcan Materials Co. v. Alabama Insurance Guaranty Association.[43]

Baxter, a company headquartered in California, filed an action in Washington seeking coverage for environmental liabilities incurred at its facilities in Washington, Oregon, Wyoming, and California. Numerous insurance companies from California and other jurisdictions had issued general liability policies to Baxter. The court found the litigation would concentrate on Baxter's California site because that was the source of greatest liability. The court recognized that both remediation of local environmental hazards and the availability of insurance to pay for the cleanup are questions of local concern, but ruled that availability of a forum in the state where the most costly cleanup will take place was "a tenable reason for a forum non conveniens dismissal."[44]

According to Equity, Baxter stands for the rule that the forum in which the largest

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[39] Myers, 115 Wn.2d at 129.

[4] Id.

[41] Id.

[42] 105 Wn. App. 657, 20 P.3d 967 (2001).

[43] 985 So.2d 376 (2007).

[44] J.H. Baxter, 105 Wn. App. at 665.

amount of real property damage lies is the proper forum for any resulting coverage dispute. In fact, the Baxter decision emphasizes the trial court's discretion in deciding each case on its facts.[45]

Vulcan Materials is an environmental case from Alabama. The underlying suit, filed in California, alleged that Vulcan was liable for environmental damage at 50 sites in that state. The Alabama court dismissed the coverage action on forum no conveniens grounds in favor of California, holding the acts giving rise to Vulcan's claim were the insurers' refusal to defend and indemnify in California. The court also considered that "[w]hether the various policies apply . . . will depend on how the contamination occurred, why it occurred, and when it occurred—all questions the answers to which will depend on evidence gathered largely from the allegedly contaminated sites."[46] Finally, the court noted that an insurance coverage action involving substantially the same parties was already under way in California, and permitting the Alabama case to continue "would unnecessarily and unjustifiably burden the parties and the respective judicial systems."[47]

Equity argues its situation is similar because the allegedly damaged properties at issue here are all in Washington. We are certainly mindful of this fact. But the location of the contaminated sites was only one of the factors in Vulcan. An almost identical lawsuit was pending in California. The party moving for dismissal conceded that the insurance case may require extensive factual investigation in California and

[45] Id. at 662, 665.

[46] Vulcan Materials, 985 So.2d at 384.

[47] Id.

coordination with the California underlying lawsuit. There is no similar concession here. In fact, since this coverage action was filed in May 2008, there has been no discovery directed to the plaintiffs in the underlying construction defects case.

Further, environmental cases involve significant state and local interest in ensuring funds are available for the cleanup, which would otherwise be paid for by taxpayers. There is no similar public interest in a contractual dispute between private actors like this one.

The geography of this coverage action points to Illinois and away from Washington. The Equity companies are all domiciled in Illinois. Some of the insurers are Illinois corporations, and all are authorized to do business there. The policies were negotiated and entered into in Illinois or other states, excluding Washington.[48] A Washington jury would therefore have to settle a dispute between foreign corporations, without any benefit to our state. Due to Equity Residential's financial strength, the HOAs are in no danger that their judgments would not be satisfied. Instead, the benefit of coverage, just as the harm caused by lack of coverage, will be felt directly by Equity Residential in Illinois. Illinois and its citizens therefore have a strong interest in the outcome of the litigation.

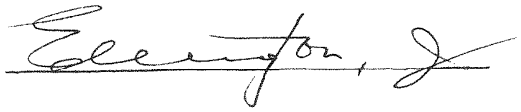
Since this lawsuit was filed, several of the insurers have filed declaratory actions

[48] The case of the ACE American policies is instructive. ACE American is domiciled in Pennsylvania and is authorized to do business in Illinois. Lockton Company, LLC, of Denver, Colorado, and Aon Risk Services of Chicago, Illinois, acted as Equity Residential's insurance brokers in relation to ACE American. ACE American negotiated its policies through its New York office, issued them in Chicago, and sent them to Lockton and Aon in Denver. ACE American handled Equity's claims from Pennsylvania; all related communications from Equity originated in Chicago.

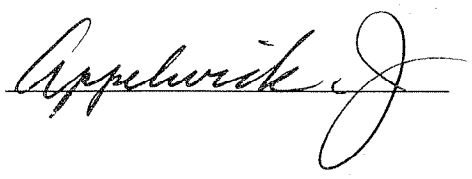
of their own in Illinois. Equity itself sued National Union and Illinois National in Illinois, although limited to a declaration that the two insurers breached their duty to defend Equity in the underlying lawsuits.[49] Thus, the Illinois courts have already been burdened with this dispute.

The trial court weighed the factors and found they favored Illinois. We see no abuse of discretion in that determination.

Affirmed.



WE CONCUR:



[49] Equity explains the rule regarding underlying plaintiffs as necessary parties is limited to coverage declaratory actions, and does not extend to duty to defend declaratory actions. For this proposition, it relies on an unpublished Illinois district court opinion applying federal law. See Georgia –Pacific Corp. v. Sentry Select Ins. Co., 2006 U.S. Dist. LEXIS 33975, at **18-19 (S.D. Ill. May 26, 2006). Illinois law seems to be to the contrary. See Soc'y of Mount Carmel v. Nat'l Ben Franklin Ins. Co. of Illinois, 268 Ill. App. 3d 655, 643 N.E.2d 1280, 1285 (1994) (underlying tort plaintiff was necessary party in duty to defend declaratory action).